Supreme Court, U.S.
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No. 93-467

In The

Supreme Court of the United States

October Term, 1993

ELIZABETH A. TILSON,

Petitioner,

v.

CITY OF WICHITA, KANSAS
MUNICIPAL CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kansas

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in light of modern medical science, the factual foundations of *Roe v. Wade* are sufficiently changed so as to require a reanalysis of the abortion right; specifically, whether the Court must consider whether or not it is now necessary to determine when life begins.

2. Whether it is still correct analysis, under the *Roe* abortion right, to consider the reproductive right and liberty right as superior to the life issue.

3. Whether since viability, as now determined by medical science exists from conception, the viability standard must be established at conception.

4. Whether the Kansas Supreme Court erred in holding petitioner's medical scientific evidence irrelevant.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, Respondent states that the only interested persons in this proceeding are those persons listed as parties to these proceedings, their attorneys, and the entities identified by the Petitioner in its Rule 29.1 Statement in its Petition for Writ of Certiorari.

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ELIZABETH A. TILSON,

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v.

CITY OF WICHITA, KANSAS
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Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Kansas

BRIEF IN OPPOSITION

The Respondent, City of Wichita, Kansas, respectfully requests that this court deny the Petition for Writ of Certiorari, seeking review of The Kansas Supreme Court's opinion in this case.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari follows the successful appeal of Respondent, the City of Wichita, from the District Court's ruling that the necessity or choice of evils defense absolved the defendant of criminal liability for her actions in trespassing at an abortion clinic. The

State District Court Judge, the Honorable Paul Clark, held that the harm caused by a legal abortion was greater than the harm caused by the defendant's illegal actions in trespassing on the clinic property, and therefore she was absolved of criminal liability for her actions.

The City's appeal was only on a question of state law and raised two legal issues of the District Court's ruling to the Kansas Supreme Court: (1) Was the necessity defense recognized by Kansas Law at the time of the defendant's arrest? and (2) Was the defense applicable to the defendant's acts of public protest?

The Kansas Supreme Court held that if recognized as a defense in a criminal case, the necessity defense only applied when the harm or evil, which the defendant sought to prevent by his or her own criminal conduct, was a legal harm or evil as opposed to the moral or ethical belief of the individual defendant. Because the harm sought to be prevented (i.e. abortion) was a legal and constitutionally protected act, the necessity defense did not apply and the defendant's evidence of when life begins was irrelevant and should not have been admitted by the trial court.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. SUMMARY OF ARGUMENT

Petitioner's Writ for Certiorari should be denied in this case for the following reasons: (1) Neither the Court below nor the record raises the questions presented in the

petition; (2) the United States Supreme Court lacks jurisdiction to review the issues presented; and (3) the Kansas Supreme Court's opinion is consistent with the decisions of the United States Supreme Court and other state courts and there is no compelling reason for the Court to intervene in this case.

The Kansas Supreme Court, in its opinion states that the only issue before it was simply "whether the necessity defense, if it were recognized, even applied at all in a case such as this one." The defendant, in her petition has misstated the issues presented and decided by the Kansas Supreme Court. Because the issues were not raised or determined below, consideration of these issues by this Court is not required.

Secondly, the United States Supreme Court lacks jurisdiction to determine the issues presented. The issues determined below involved only the interpretation of Kansas Criminal Law. Because there were no substantive federal questions raised or determined by the lower court, Petitioner's Writ for Certiorari must be denied.

Lastly, the lower court's ruling comports with the United States Supreme Court's rulings regarding the legality of and the constitutional protections afforded to abortions. The decision also is consistent with the numerous jurisdictions which have addressed the issue of whether the necessity defense applies to acts of public protest. There is no compelling reason, in the context of this case, for the Court to grant Certiorari.

II. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTIONS PRESENTED IN THE PETITION.

Petitioner, in her Petition for Writ, asserts that there are four issues which are properly before this Court. These assertions not only misconstrue the opinion of The Kansas Supreme Court, but misstate the issues which were appealed by the City of Wichita to the Kansas Supreme Court.

For purposes of determining questions of state law, the City appealed two legal issues to The Kansas Supreme Court: (1) Was the necessity defense recognized by Kansas Law; and (2) Did the defense apply to acts of public protest? As the Kansas Supreme Court noted in its opinion, the only issue properly before it was that if the defense was recognized, did the defense apply to the facts before the court. *City of Wichita v. Tilson*, 253 Kan. 285, 855 P.2d 911 (1993).

The Kansas Supreme Court, in reversing the trial court, expressly held that the determination of the issue of when life began did not need to be decided: Where the objective sought to be prevented was a lawful, constitutional right, the common law defense of necessity was inapplicable and any such evidence as to when life began was irrelevant. *City of Wichita v. Tilson*, 253 Kan. 285, 855 P.2d 911 (1993).

In determining if petitioner's Writ should be granted, this Court must inquire as to whether the federal question was presented to the state court in such a manner that it was necessarily decided by the state court. When

the highest state court fails to pass upon a federal question, it is assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show otherwise. *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572, 579 (1969), *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392, 396 (1981) and *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 2321, 76 L.Ed.2d 527 (1983) (Court has no jurisdiction unless a federal question had both been raised and decided in the State Court below. If both of these requirements do not appear on the record, the appellate jurisdiction fails.)

In this case, there were no issues of federal law presented to or decided by the Kansas Supreme Court. The issues presented were questions of state law only. Because the federal issues cited by petitioner were not presented below, petitioner's Writ for Certiorari should be denied.

III. THE COURT LACKS JURISDICTION TO REVIEW THE ISSUES PRESENTED.

The petitioner asserts that jurisdiction is proper pursuant to 28 U.S.C. § 1257, (Rule 10.1(c) of *The Rules of The United States Supreme Court*). This section provides jurisdiction to this Court when: "[a] State Court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court." (Rule 10.1(c) of *The Rules of the United States Supreme Court*). Because the Petitioner cannot establish

either of these criteria, the United States Supreme Court lacks jurisdiction to hear the appeal.

The Kansas Supreme Court's holding that the necessity defense does not apply to prevent a lawful constitutional right (i.e. abortion) did not conflict with the United States Supreme Court's opinions regarding the status and constitutional protections afforded to abortions. *See Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973) and *Planned Parenthood of Southeastern Penn. v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 120 L.Ed. 2d 674 (1992).

Petitioner asserts that because of the scientific evidence presented, that the United States Supreme Court's decision in *Roe* must be re-examined and therefore the court has jurisdiction. Petitioner ignores the fact that no federal question was determined by the Kansas Supreme Court to grant jurisdiction to the United States Supreme Court, and the Kansas Supreme Court expressly held that such medical evidence was irrelevant.

The issue before the United States Supreme Court pertains to the applicability of a state law defense to the defendant's actions. "Crimes in the U.S. are what the laws of the individual states make them, subject to the limitations of Art. I, Sec. 10, Cl. 1 and the Thirteenth and Fourteenth Amendments." *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

The issue decided by the Kansas Supreme Court did not resolve any issue of federal or constitutional law. As framed by the petitioner, the issues presented to the United States Supreme Court do not involve any issues of federal or constitutional law. Because the lower court made no decisions regarding substantive federal law, the

United States Supreme Court lacks jurisdiction to hear the appeal and petitioner's Writ for Certiorari should be denied.

IV. THE DECISION OF THE KANSAS SUPREME COURT IS CONSISTENT WITH THE OPINIONS OF THE UNITED STATES SUPREME COURT, AND OTHER STATE COURTS WHICH HAVE ADDRESSED THIS ISSUE. THERE IS NO REASON FOR THE COURT TO GRANT CERTIORARI.

As stated previously, the opinion of the Kansas Supreme Court is consistent with the United States Supreme Court's opinions regarding abortion and the constitutional protections afforded to abortions. *See Roe v. Wade, supra* and *Casey, supra.*

Further, the opinion of the Kansas Supreme Court is consistent with the overwhelming majority of states that have addressed this issue. *See* Annotation, *Choice of Evils, Necessity, Duress, or Similar Defense to State or Local, Criminal Charges Based on Acts of Public Protests,* 3 A.L.R. 5th 521 (1992). Lastly, the United States Supreme Court has consistently refused to grant Certiorari in other cases pertaining the precise issue determined by the Kansas Supreme Court. *See State v. Anthony,* 588 A. 2d. 214 (Conn. App. 1991) *cert. denied* ___ U.S. ___, 112 S.Ct. 312, 116 L.Ed.2d. 254 (1991) (refusal to consider abortion protester's necessity defense for simple trespass was not an abuse of discretion as the harm sought to be prevented by the defendant was not recognized as an injury under the law); *State v. Migliorino,* 442 N.W.2d 36 (Wisc. 1988) *cert. denied* 493 U.S. 1004, 110 S.Ct. 565, 107 L.Ed.2d 560 (1988) (necessity defense not applicable to acts of protest at

abortion clinics); *Commonwealth v. Markum*, 541 A.2d 347 (Pa.Super. 1988) *cert. denied*, 489 U.S. 1080, 109 S.Ct. 1533, 103 L.Ed. 2d 837 (1989); *Crabb v. State*, 754 S.W.2d 742 (Tex. App. Houston 1988) *cert. denied* 493 U.S. 815, 110 S.Ct. 65, 107 L.Ed.2d 32 (1989) (statutory defense of necessity did not apply to protests at abortion facilities); *Bobo v. State*, 757 S.W.2d 58 (Tex. App. Houston 1988) *cert. denied* 490 U.S. 1066, 109 S.Ct. 2066, 104 L.Ed.2d 631 (1989) (no error in trial court's refusal to allow introduction of evidence on the necessity defense); *Erlandson v. State*, 763 S.W.2d 845 (Tex. App. Houston 1988) *cert. denied* 493 U.S. 852, 110 S.Ct. 152, 107 L.Ed.2d 110 (1989) (necessity defense not applicable to protesters at abortion clinic); *Reed v. State*, 794 S.W.2d 806 (Tex. App. Houston 1990) *cert. denied* ___ U.S. ___, 111 S.Ct. 2018, 114 L.Ed.2d 104 (1991) (evidence regarding the defense of necessity was irrelevant in context of protests at abortion clinics); *Chunn v. State*, 821 S.W.2d 718 (Tex. App. Houston 1991) *cert. denied* ___ U.S. ___, 113 S.Ct. 203, 121 L.Ed.2d 144 (1992) (no error in trial court failing to instruct on necessity defense); *Zarsky v. State*, 827 S.W.2d 408 (Tex. App. Corpus Christi (1992)) *cert. denied* ___ U.S. ___, 113 S.Ct. 1586, 123 L.Ed.2d 152 (1993) (antiabortion protester being prosecuted for tresspass was not entitled to raise defense of necessity); *Boushey v. State* 804 S.W.2d 148 (Tex. App. Corpus Christi 1990) *cert. denied* ___ U.S. ___, 112 S.Ct. 311, 116 L.Ed.2d 253 (1991) (no error in refusing to admit evidence as to when life begins).

There are no distinguishing factors in the case at bar from those cited above which would require the Court to

grant Certiorari. There are no issues of federal or constitutional law to be determined. Consequently, petitioner's Writ of Certiorari should be denied.

CONCLUSION

For the reasons stated above, the City of Wichita respectfully requests that the Court deny the Petition for Writ of Certiorari to the Kansas Supreme Court.

Respectfully submitted,

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